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No. 94-182

In The

Supreme Court of the United States

October Term, 1994

REBECCA A. BOOSTROM,

Petitioner,

v.

STEPHEN BACH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Indiana

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Was Rebecca Boostrom denied due process by the Vanderburgh Small Claims Court when a summary judgment hearing was held, even though no summary judgment hearing is required by Ind. Trial Rule 56 and Ind. Trial Rule 73?

2. Is it a denial of due process to require a small claims claimant to pay the filing fee upon filing a small claims complaint?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This is a case of alleged attorney malpractice. Rebecca Boostrom ("Mrs. Boostrom") filed her Complaint in the Vanderburgh Superior Court, the Small Claims Division, on February 5, 1990. (R., p. 3.) Mr. Bach filed a Motion for Summary Judgment on April 24, 1990. (R., p. 128.) In that motion, Mr. Bach argued that the Complaint filed February 5, 1990, was untimely and that Mrs. Boostrom had not been damaged by any alleged act of malpractice. (R., p. 158-159.)

Mrs. Boostrom responded to the motion by filing a Motion to Correct Minutes on May 11, 1990. In this motion, she requested the court to change the date of the

filing of her Complaint from February 5, 1990, to January 12, 1990, for that was the date she alleged she mailed it to the Clerk. She, however, indicated in her Motion to Correct Minutes that she did not pay the required filing fee when she mailed her Complaint to the Court Clerk. (R., pp. 28, 29, 30, 31 and 32.)

On June 4, 1990, Mrs. Boostrom also filed a Response to the statute of limitations argument. (R., p. 35.) She did not, however, respond to the argument that she had not been damaged by any alleged act of malpractice. (R., pp. 35, 36.) June 4, 1990, was the day of the hearing on the Motion for Summary Judgment. Mrs. Boostrom appeared in person and so did Mr. Bach. (R., p. 37.) That same day, the trial court entered summary judgment as follows:

> Comes now the plaintiff, Rebecca Boostrom, in person, pro se, and the defendant, Steve C. Bach, in person, pro se, for hearing on the defendant's Motion for Summary Judgment, and the Court being duly advised in the premises, and having heard the evidence in support of said motion, now finds that there is no genuine issue of material fact regarding this cause of action, and that the law is with the defendant and against the plaintiff on all issues presented by the plaintiff's Complaint and Amended Complaint, and that the defendant is entitled to summary judgment as a matter of law.
>
> IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that:
>
> 1. This action was filed on February 5, 1990 and was filed more than two years after all alleged acts of malpractice occurred upon which the plaintiff bases her action herein; that the

plaintiff has no valid excuse for not filing her action before said date.

2. That all of the acts alleged in plaintiff's Complaint or Amended Complaint are for malpractice and come within the provisions of Indiana Code § 34-1-2-2(1).

3. That the plaintiff has no claim for breach of contract in her Complaint or Amended Complaint other than for said alleged acts of malpractice and no damages are alleged for breach of contract that are not barred by said statute of limitations.

4. That as a result of this action being barred by said statute of limitations the plaintiff shall take nothing by way of her Complaint or Amended Complaint.

_____

Judge, Vanderburgh Superior
Court, Small Claims Division

Mrs. Boostrom filed a Motion to Correct Errors on June 11, 1990. It was denied without hearing on June 11, 1990. (R., pp. 39, 40, 41 and 42.) Mrs. Boostrom filed a praecipe on July 3, 1990 (R., p. 44), and perfected an appeal.

On April 6, 1992, the Court of Appeals reversed the grant of summary judgment in favor of Mr. Bach. *See Boostrom v. Bach* (1992), Ind.App., 589 N.E.2d 275.

The Indiana Supreme Court accepted transfer of the case and vacated the Indiana Court of Appeals' opinion. *See Boostrom v. Bach* (1993), Ind., 622 N.E.2d 175. It found that the statute of limitations for an attorney malpractice claim in Indiana is not tolled when a complaint is tendered to the clerk but the prescribed filing fee is not.

(Joint Appendix, pp. 3-4.) The Indiana Supreme Court found that there are two purposes behind the statute of limitations. The first is to spare courts from stale claims, and the second is to ensure that defendants are given formal and seasonable notice that a claim is being asserted against them. (Joint Appendix, p. 9.) Requiring that a court cost fee be paid at the time of filing the complaint ensures that a defendant will be given formal and seasonable notice of the claim. (Joint Appendix, pp. 9-10.)

This Petition for Certiorari followed the Indiana Supreme Court opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

1. A Hearing Was Held On The Motion for Summary Judgment.

Mrs. Boostrom argues that she was denied due process since the small claims court of Vanderburgh County, Indiana, did not hold a hearing on Mr. Bach's Motion for Summary Judgment. This is incorrect. The Vanderburgh Small Claims Court did hold a hearing on Mr. Bach's Motion for Summary Judgment. The entry on the Motion for Summary Judgment shows clearly that on June 4, 1990, the parties appeared for a hearing on the Motion for Summary Judgment. It states:

> Comes now the plaintiff, Rebecca Boostrom, in person pro se, and the defendant, Stephen C. Bach, in person pro se, for hearing on the defendant's motion for summary judgment, . . .

(Joint Appendix, p. 36.)[1] (Emphasis added.) There was a hearing on the Motion for Summary Judgment.

While most of the hearing concerned Mrs. Boostrom's Motion to Correct Minutes, the Motion to Correct Mintues was related and pertained to the statute of limitations defense raised by the Motion for Summary Judgment. Even Mrs. Boostrom admits this:

> By the Court: Okay, what is your motion to correct minutes? Explain that to me.
>
> Mrs. Boostrom: Well, this is important because it deals with the statute of limitations.

(Joint Appendix, p. 43.)

A ruling on the Motion to Correct Minutes was dispositive of the Motion for Summary Judgment. If the complaint was not filed until Mrs. Boostrom paid the filing fee, the complaint was filed beyond the statute of limitations. However, if the complaint was filed on the date that it was mailed without payment, then the complaint was filed within the statute of limitations. Mrs. Boostrom knew that in arguing her Motion to Correct Minutes, she was in fact arguing the Motion for Summary Judgment based on the statute of limitations defense:

---

[1] Mrs. Boostrom has filed a Joint Appendix even though there has not been an entry granting the Writ of Certiorari, pursuant to Rule 26.1. Also, no attempt was made by Mrs. Boostrom to permit Mr. Bach to agree on the contents of the appendix pursuant to Rule 26.2. However, since the Joint Appendix was accepted and filed by the court, references will be made directly to that appendix.

Mrs. Boostrom: Well, I thought that I had sent a check, but it doesn't matter. This is the exhibit I would like to file. *You can perfect your claim after you file it.*

Mr. Bach: *No, you cannot. That's the very problem.*

(Joint Appendix, pp. 44-45.):

By the Court: Okay. *The motion to correct minutes would seem to be the prelude to your motion for summary judgment. If, in fact, I denied it, then it would be outside the statute of limitations which would take care of your motion for summary judgment.* I just – I'm trying to determine at this time the filing fee. Mrs. Boostrom, how many cases have you filed in Vanderburgh County, do you know, personally, as a –

Mrs. Boostrom: Well, I use to file some small claims, you know, for eviction and to collect rent and damages.

(Joint Appendix, pp. 61-62.) (Emphasis added.)

Consequently, when the court denied Mrs. Boostrom's Motion to Correct Minutes, it also required the court to grant the Motion for Summary Judgment:

By the Court: Okay, I'll make a determination on that date. Show that the motion to correct minutes is denied; that the filing – the

> record will reflect that Mrs. Boostrom has had numerous contacts with the clerk's office with reference to previous filings in this county and is well aware of the rules requiring a filing fee; that she has stated that no filing fee was filed whatsoever and the January 12th date does not go into effect because even though it was mailed by certified mail, it still was not perfected because there was no filing fee included. *Therefore, the Court determines that the filing date was the date of the second mailing, which falls outside of the statute of limitations which tolled and ended on January 12, 1990. Mr. Bach, you have a motion for summary judgment based upon failure to perfect filing in this suit within the necessary statute of limitations. We'll show the motion for summary judgment is granted and that takes care of the case.*

(Joint Appendix, pp. 70-71.) (Emphasis added.)

Mrs. Boostrom was given a hearing on the Motion for Summary Judgment. She argued that she did not have to pay the filing fee for the complaint to be filed. Mr. Bach argued to the contrary, that the filing was not perfected until the filing fee was paid. The trial court found that the filing was not perfected until the filing fee was paid and,

consequently, the Motion to Correct Minutes was denied and the Motion for Summary Judgment was granted. The two motions went hand-in-hand. Mrs. Boostrom was given an opportunity to be heard. She was accorded due process.

2. The Court Is Not Required To Hold A Hearing On A Motion for Summary Judgment.

Nothing in Indiana Trial Rule 56 requires a hearing to be held on a motion for summary judgment. Indiana Trial Rule 73 makes clear that the court need not hold a hearing on a motion for summary judgment:

> (A) **Hearings Upon Motions**. . . . To expedite its business the court may direct the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition, or direct or permit hearings by telephone conference call with all attorneys or other similar means of communication.

Ind. Trial Rule 73(A). In this case, the Vanderburgh Small Claims Court could have merely directed the submission and determination of the Motion for Summary Judgment without oral hearing upon the Brief in Support of Motion for Summary Judgment submitted by Mr. Bach, and upon Mrs. Boostrom's Motion to Correct Minutes. No hearing was necessary.

Ind. Trial Rule 73 is based upon Federal Rule of Civil Procedure 78, which states in pertinent part:

> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral

> hearing upon brief written statements of reasons in support and opposition.

Fed.R.Civ.P. 78. Many federal courts have found that oral arguments are not necessary in deciding motions for summary judgment: *Geear v. Boulder Community Hospital*, 844 F.2d 764 (10th Cir. 1988); *Allied Chemical Corp. v. Mackay*, 695 F.2d 854 (5th Cir. 1983); *Barker v. Norman*, 651 F.2d 1107 (5th Cir. 1981); *McMillan v. Rock Mart*, 653 F.2d 907 (5th Cir. 1981); *Spark v. Catholic University of America*, 510 F.2d 1277 (D.C. Cir. 1975); *Parish v. Howard*, 459 F.2d 616 (8th Cir. 1972); *Twin City Constr. Co. v. United States*, 515 F.Supp. 767 (D.N.D. 1981); *Rhodus v. Dumiller*, 552 F.Supp. 425 (M.D. La. 1982).

No hearing was necessary on Mr. Bach's Motion for Summary Judgment since the issues of law addressed by the Vanderburgh Small Claims Court could adequately have been decided by a review of Mr. Bach's Brief in Support of Motion for Summary Judgment, Mrs. Boostrom's response to the motion, and by review of Mrs. Boostrom's Motion to Correct Minutes. Nonetheless, as indicated in the previous section, a hearing was held on the motion. There was no violation of due process.

3. It Is Not A Denial Of Due Process To Require That A Small Claims Filing Fee Be Paid Upon The Filing Of A Complaint.

A. Mrs. Boostrom Had Actual Notice That She Was Required To Pay The Filing Fee Upon Commencement Of The Action.

Prior to discussing the substantive law applicable to this issue, it is important to point out that Mrs. Boostrom

knew that a small claims filing fee was required to be paid upon the filing of a complaint. Throughout her petition, she argues that the Indiana Supreme Court imposed a new requirement, one of which she was not aware. She claims that herself, a layman, lacked notice of this requirement since it was not contained in any Indiana statute or rule. This is a misstatement. Mrs. Boostrom had, on numerous occasions, filed small claims complaints in Vanderburgh Small Claims Court. Each time, she paid the filing fee with the complaint. The following testimony at the hearing on the Motion for Summary Judgment indicates that Mrs. Boostrom was well aware of the procedure she was required to follow when filing a small claims complaint:

The Court:	. . . Mrs. Boostrom, how many cases have you filed in Vanderburgh County, do you know, personally, as a –
Mrs. Boostrom:	Well, I use to file some Small Claims, you know, for eviction and to collect rent and damages.
By the Court:	Alright, you've filed an estimate of how many cases on your own, without an attorney?
Mrs. Boostrom:	I don't know, just for rent and damages, I don't know. *I can't remember, at least six.*
By the Court:	Okay, and then in some other cases that you've had up there in the past few years, other

than the rent and damage cases?

Mrs. Boostrom: I haven't filed any cases recently.

By the Court: Since January of 1989, have you filed any cases, other than this one?

Mrs. Boostrom: I haven't had to file any rent and damage cases for a long time down here.

By the Court: Any other type of case? Any other type of case at all?

Mrs. Boostrom: Well, I countersued Mr. Sheets. That was in 1988.

Mr. Bach: You have a case against Mr. Hatfield, too, don't you?

Mrs. Boostrom: Yes, I filed that at the time that I filed against you since you two never got my case settled.

(Joint Appendix, pp. 62-63.) Mrs. Boostrom filed at least six other small claims cases before filing this one against Mr. Bach. While Mrs. Boostrom is a layman,[2] she knew the procedure to be followed in filing small claims cases in Vanderburgh Small Claims Court.

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[2] Mrs. Boostrom is a very educated layman. She is an english teacher. She has a master's degree and, at the time of the hearing on the Motion for Summary Judgment, she was in the process of receiving her Ph.D. (Joint Appendix, pp. 58-59.)

The trial court made this express finding in its order:

> By the Court: Okay, I'll make a determination on that date. Show that the motion to correct minutes is denied; that the filing – *the record will reflect that Mrs. Boostrom has had numerous contacts with the clerk's office with reference to previous filings in this county and is well aware of the rules requiring a filing fee; . . .*

(Joint Appendix, pp. 70-71.) (Emphasis added.) Mrs. Boostrom had actual notice in this case of the requirement of a filing fee. There was no denial of due process.

B. Mrs. Boostrom Is Not Claiming She Could Not Afford To Pay The Fee, She Merely Forgot.

This is not a case where Mrs. Boostrom is asserting that she could not afford to pay the filing fee. She eventually paid the filing fee and admitted to the court that she merely forgot to mail a check when she mailed the small claims complaint:

> By the Court: Oh, you hadn't sent in anything, is that right?
>
> Mrs. Boostrom: I didn't pay any attention to it, *I just sent the money order 'cause a lot of people require you to send a money order, not a check.*
>
> By the Court: In paragraph 4 of your motion to correct minutes, it says the deputy clerk wrote to me and requested a money order, not a check, for the filing fee.

Mrs. Boostrom: Uh-huh.

By the Court: Did you send a check in originally?

Mrs. Boostrom: Well, then later I looked 'cause I wanted –

By the Court: Yes or no, did you send a check?

Mrs. Boostrom: – to see if I had and I looked in my checkbook register and I couldn't find any record that I had sent a check, *so I don't think I did 'cause I couldn't find a record that I did. But at the time, I thought that I had.*

By the Court: So no money was sent in at all on January 12th?

Mrs. Boostrom: Well –

By the Court: No filing fee at all?

Mrs. Boostrom: – I thought that I did, but then when I looked back later in case that it came up if I had any proof that I did, I couldn't find anything in my checkbook register, so I don't have any proof that I did.

(Joint Appendix, pp. 67-68.) This is not a case where a small claims claimant could not afford to pay the filing fee; Mrs. Boostrom merely forgot.

C. The Indiana Legislature Has For 43 Years Required That The Filing Fee Be Paid Upon Commencement Of The Action.

It has been the law in Indiana for forty-three (43) years that the filing fee must be paid when the small claims complaint is filed. After defining what the costs consist of, Ind. Code § 33-11.6-4-15 states:

> *The docket fee and the costs for the initial service of process shall be paid upon the institution of each case.* The cost of service rendered subsequent to the initial service shall be assessed and paid after such service has been made, and the cost of witness fees shall be paid before the witnesses are called.

Ind. Code § 33-11.6-4-15 (West's Supp. 1990) (Emphasis added). Ind. Code § 33-11.6 specifically applies to small claims courts.

While the Vanderburgh Superior Court's small claims docket is not a small claims court as defined by I.C. 33-11.6, the Indiana Legislature has required prepayment of certain fees, including a docket fee and the service of process fee in all civil actions filed in circuit or superior courts since 1949. *See* Compiler's Note to Ind. Code § 33-1-9-1 (Burns 1975). A review of the legislative history shows this to be true.

In 1973, the applicable statute stated in pertinent part:

> **33-1-9-1 [49-1305a]. Payment when action instituted - Docket fee - Clerk's service fee - Refunds - Exceptions.**

> (a) *Upon the institution of any civil action or proceeding,* whether by original process, removal or otherwise in any circuit, superior or probate court, there shall be paid by the party or parties so instituting such action or proceeding the sum of Nineteen Dollars [$19.00], Seven Dollars [$7.00] of which shall constitute a docket fee payable to the State of Indiana, and which said docket fee now required by law to be taxed by clerks of circuit courts for any action in any circuit, superior or probate court wherein there is a plaintiff and defendant, except as hereinafter set out; . . .

I.C. 33-1-9-1 (Burns 1975) (Emphasis added.). This statute was repealed by Acts 1978 P.L. 2, § 3308, Acts 1982, P.L. 181. *See* Compiler's Note I.C. 33-1-9-1 (Burns Supp. 1991). It was replaced by I.C. 33-1-9-1.1.

In 1982, Ind. Code § 33-1-9-1.1 stated in pertinent part:

> (a) *Upon the institution of a civil action,* whether by original process, removal, or otherwise in a circuit, superior or probate court, the party or parties instituting the action shall pay Twenty-Three Dollars ($23). . . .

I.C. 33-1-9-1.1 (West's 1983) (Emphasis added.). This statute was repealed by P.L. 171-1984, § 80. It was replaced by Ind. Code § 33-17-3. *See* Historical Note to I.C. 33-1-9-1.1 (West's Supp. 1991).

Ind. Code § 33-17-3, however, also required the payment of fees upon commencement of the action. As stated by Ind. Code § 33-17-3-2:

> *The clerk shall charge and collect the following fees upon the commencement of a civil action* in probate or municipal court or on the plenary docket of a circuit, superior or county court: . . .

See I.C. 33-17-3-2 (Burns 1985) (Emphasis added). I.C. 33-17-3-5 provided exceptions to the prepayment rule. It stated:

> The prepayment of the court fees specified in Section 2 [33-17-3-2] of this Chapter is not required in:
>
> 1. Appeals of civil matters from courts of lesser jurisdiction than circuit court;
>
> 2. Adoption proceedings; and
>
> 3. Proceedings for the appointment of guardians.

I.C. 33-17-3-5 (Burns 1985). It should be noted that I.C. 33-17-3-6 specifically required the clerk to collect, "upon the commencement of a civil action on the small claims docket of a circuit, superior or county court", a judicial salary fee, a county docket fee, which included payment for service of process by registered or certified mail, and the cost of publishing any notices. *See* I.C. 33-17-3-6 (Burns 1985).

Effective July 1, 1987, I.C. 33-17-3 was repealed. *See* Compiler's Notes to I.C. 33-17-3-1 (Burns Supp. 1991). It was replaced by Ind. Code § 33-19-3; however, it is clear from I.C. 33-19-3 that the legislature's intent was to require prepayment of fees except in limited circumstances. Not coincidentally, those limited circumstances were the same as those previously stated in Ind. Code

§ 33-17-3. For example, in Ind. Code § 33-19-3-4, the legislature states:

> The prepayment of fees under this Chapter is not required in appeals of civil matters to circuit courts from courts of inferior jurisdiction.

This same exception is identified in former Ind. Code § 33-17-3-5(1). Also, in current Ind. Code § 33-19-4-1, two other exceptions to prepayment of fees are specified:

> Prepayment of fees is not required in proceedings for:
>
> 1. Adoption; or
>
> 2. The appointment of a guardian.

I.C. 33-19-4-1 (West's Supp. 1991). Not coincidentally, these two exceptions to prepayment are also specified in former I.C. 33-17-3-5(2) and (3). It has been the law in Indiana for 43 years that the filing fee be paid upon commencement of the action.

There are legitimate state interests involved in requiring payment of the filing fee before filing the complaint. If prepayment were not required, frivolous and multiple actions could be filed without the state being able to collect for the burden on its court system. The only remedy in such a case would be dismissal on motion of the defendant after the system had already been abused by a litigious party:

> Essentially the legal question here is whether the state may limit access to its civil courts by the requirement of a filing fee – -Where the right has been granted by the legislature it may be conditioned on the payment of a modest filing fee because of the legitimate interest of the State

> in financial support of the courts and in discouraging frivolous appeals by those able to pay as well as those unable to pay.

Frederick v. Schwartz, 296 F.Supp. 1321, (D. Conn. 1969). There are legitimate state interests involved in requiring a filing fee be paid upon commencement of the action. It is not a denial of due process.

D. The Indiana Supreme Court Merely Interpreted Indiana Common Law.

In its opinion, the Indiana Supreme Court was merely interpreting Indiana's common law:

> We grant transfer to consider whether the statute of limitations is tolled when a complaint is tendered to the clerk, but the prescribed filing fee is not. We hold that it continues to run.

(Joint Appendix, pp. 3-4.) The Indiana Supreme Court found that the statute of limitations exists not only to spare courts from stale claims, but to ensure that the defendant is given formal and seasonable notice that a claim is being made:

> On the other hand, the statute of limitations exists not only to spare courts from stale claims, *Matter of M.D.H.* (1982), Ind.App., 437 N.E.2d 199, but also "to ensure that parties are given formal and seasonable notice that a claim is being asserted against them." *State ex rel. Young v. Noble Circuit Court* (1975), 263 Ind. 353, 359, 332 N.E.2d 99, 103.

(Joint Appendix, p. 9.)

The Supreme Court found that tendering the filing fee is relevant to this latter objective of providing the defendant with formal and seasonable notice of the claim. Consequently, a notice of claim or complaint is not filed unless the filing fee is paid:

> Tendering the prescribed court costs fee is relevant as to this latter objective. C.F. Ind. Code Ann. § 33-19-3-5 (West Supp. 1992) (costs fee include costs of initiating service of process). Therefore, while we agree that "the filing of the complaint will toll the statute of limitations," Civil Code Study Commission, Comments to Trial Rule 3, reprinted in one William F. Harvey, *Indiana Practice* 60 (2d Ed. 1987), we also conclude that a notice of claim or complaint is not filed unless the filing of the fee and the notice/complaint have occurred by any of the means permitted by T.R. 5(E).
>
> Such an approach is consistent with the modern notion that the commencement of an action occurs when the plaintiff presents the clerk with the documents necessary for commencement of suit. . . .

(Joint Appendix, pp. 9-10.) The Indiana Supreme Court merely interpreted what is necessary under Indiana law to toll the statute of limitations for an attorney malpractice claim.

E. This Is Not A Case Which Merits The Review Of This Court.

1. There was no competent, admissible evidence submitted by Rebecca Boostrom in opposition to the Motion for Summary Judgment.

The trial court's grant of summary judgment could have been affirmed on other state law grounds. Mr. Bach filed his Motion for Summary Judgment on April 24, 1990. On May 11, 1990, Mrs. Boostrom filed a Motion to Correct Minutes requesting that her Complaint be file-stamped on January 12, 1990, instead of February 5, 1990. This Motion to Correct Minutes was not a verified motion. It was not sworn to in any way. The exhibits attached to the Motion to Correct Minutes were also not authenticated or sworn to in any way, and Mrs. Boostrom was not under oath on June 4, 1990, when the court heard both motions. Mrs. Boostrom, therefore, submitted no competent evidence in opposition to the Motion for Summary Judgment. *See Freson v. Combs* (1982), Ind.App., 433 N.E.2d 55; *Funk v. Funk* (1990), Ind.App., 563 N.E.2d 127, 132; *Conard v. Waugh* (1985), Ind.App., 474 N.E.2d 130, 135-136; *McMahon v. SnapOn Tool Corp.* (1985), Ind.App., 478 N.E.2d 116, 122, n.4.

The Indiana Rules of Evidence apply with equal force to cases in small claims court. The Indiana Trial Rules govern small claims proceedings to the extent that they are not inconsistent with the small claims rules. *Muenich v. Gulden* (1991), Ind.App., 579 N.E.2d 665, 666; *Frank H. Monroe Heating & Cooling, Inc. v. Rider* (1983), Ind.App., 450 N.E.2d 1056, 1057. The Indiana Court of Appeals has

specifically concluded that Trial Rule 56 and summary judgments are applicable to small claims courts. *Bedree v. Sandler & Sandler* (1981), Ind.App., 426 N.E.2d 707, 708. As stated by the Indiana Court of Appeals in *Bedree*:

> Nothing in the Indiana Rules for Small Claims prohibits either party from filing a motion for summary judgment or the trial court from ruling on such a motion. Bedree argues that Small Claims Rule 8 is such a prohibition. However, Small Claims Rule 8 concerns itself with the informality of the actual hearing or trial.
>
> Until a change is made in the Indiana Rules of Procedure, motions for summary judgments may be granted in small claims court actions. The granting of a summary judgment, however, is only proper when there is no genuine issue of material fact. (Citations omitted.)

426 N.E.2d at 708. In *Bedree*, the defendant argued that Small Claims Rule 8(A) prevented Trial Rule 56 from applying in small claims court. Small Claims Rule 8(A) provides:

> The trial shall be informal, with the sole objective of dispensing speedy justice between the parties according to the rules of substantive law, and shall not be bound by the statutory provisions or rules of practice, procedure, pleadings or evidence except provisions relating to privileged communications and offers of compromise.

The Court of Appeals in *Bedree* held that this rule applied only to the actual hearing or trial. 426 N.E.2d at 708. The same conclusion was reached by the court in

Muenich v. Gulden, where the Court of Appeals determined that Small Claims Rule 8(A) "sets forth the procedure to be followed in the small claims *trial* itself." 579 N.E.2d at 667. (Emphasis added.)

Mrs. Boostrom was required to oppose the Motion for Summary Judgment with actual evidence. She was required to authenticate or certify her exhibits and she was required to submit testimony in verified form as required by Trial Rule 56. Since she did not do so, summary judgment against her was proper.

2. Mr. Bach presented uncontroverted evidence that the withdrawal of his representation of Mrs. Boostrom in the underlying lawsuit was accomplished without adverse effect to her.

An action for attorney negligence in Indiana is comprised of four elements: (1) employment of the attorney; (2) failure of the attorney to exercise ordinary skill and knowledge; (3) damage; and (4) the negligence must be the proximate cause of the damage. *Bailey v. Martz* (1986), Ind.App., 488 N.E.2d 716; *Fiddler v. Hobbs* (1985), Ind.App., 475 N.E.2d 1172. Here, Mr. Bach presented uncontroverted evidence that his withdrawal of representation for Mrs. Boostrom in the underlying action was completed without adverse effect to Mrs. Boostrom. The trial court allowed his withdrawal of representation finding, pursuant to Indiana Rule of Professional Conduct 1.16(b), no adverse effect to Mrs. Boostrom.

In her Complaint, Mrs. Boostrom alleged that she was damaged in three ways. She claimed that she was unable to obtain legal representation on a contingency

contract, that she suffered the loss of her claim for conversion, and she claimed that she suffered the loss of her claim for punitive damages. (R. 22.) The trial court's motion permitting Mr. Bach to withdraw disposed of all of these claims. (R. 131.)

At the time of Mr. Bach's withdrawal, he, on behalf of Mrs. Boostrom, was pursuing both a claim of conversion and a punitive damages claim. (R. 141-143, 150-151.) Mrs. Boostrom was still able to pursue these claims after Bach's withdrawal and, in fact, attorney Steven Sheets entered an appearance for Mrs. Boostrom on April 14, 1988. (R. 137.) Thus, there was no adverse effect to Mrs. Boostrom.

At the very least, on the basis of this evidence, Mrs. Boostrom was required to come forward with some evidence which would demonstrate that she had been damaged. Ind. Trial Rule 56(E). As demonstrated above, she came forward with no competent evidence and absolutely no evidence with regard to the issue of damage. The summary judgment in favor of Mr. Bach could have been affirmed on this basis as well.

CONCLUSION

For all of the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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